

(15,659.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 775.

HARRY F. BATCHELOR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 10, 1894.

1-91 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HARRY F. BATCHELOR, Defendant.

Be it remembered that on the twenty-ninth day of November, 1893, there was duly presented, filed, and recorded in the circuit court of the United States for the district of Montana an indictment against said named defendant, Harry F. Batchelor; which said indictment is in the words and figures as follows, to wit:

* * * * * * *

92 And thereafter, to wit, on the 29th day of November, A. D. 1893, a bench warrant was duly issued in said cause; which said bench warrant, together with the return of the United States marshal thereon, is in the words and figures as follows, to wit:

93 UNITED STATES OF AMERICA, } ss:
District of Montana, }

To the marshal of the United States of America for the district of Montana and his deputies or any or either of them, Greeting:

Whereas at a circuit court of the United States of America for the district of Montana, begun and held at the city of Helena, within and for the district aforesaid, on the 29th day of November, in the year of our Lord one thousand eight hundred and ninety-three, the grand jurors in and for the said district brought into the said court a true bill of indictment against Harry F. Batchelor for embezzlement as president Stockgrowers' National Bank of Miles City, Montana, as by the said indictment, now remaining on file and of record in said court, will more fully appear; to which indictment the said Harry F. Batchelor has not yet appeared or pleaded:

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Harry F. Batchelor and him bring before the said court, at the United States circuit court room, in the Gold block, Helena, to answer the indictment aforesaid.

Seal United States Circuit Court, District of Montana, 1890.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court this 29th day of November, in the year of our Lord one thousand eight hundred and ninety-three, and of our Independence the 118th.

GEO. W. SPROULE, *Clerk,*
By —— ——, *Deputy Clerk.*

94 UNITED STATES OF AMERICA, }
District of Montana. }

MARSHAL'S OFFICE.

In obedience to the warrant I have the body of the said Harry F. Batchelor before the honorable the circuit court of the United States in and for the district of Montana this 29th day of November, A. D. 1893.

W. F. FURAY,
U. S. Marshal,
By —— ——,
Deputy U. S. Marshal.

[Endorsed:] No. 168. United States circuit court, district of Montana. The United States of America *vs.* Harry F. Batchelor. Bench warrant. Bail fixed at $5,000.00. —— ——, U. S. attorney. Filed Nov. 29th, 1894. Geo. W. Sproule, clerk, by —— ——, deputy clerk.

95 And thereafter, to wit, on the 29th day of November, A. D. 1893, the following proceedings were had and entered of record herein in the words and figures as follows, to wit:

19th Day, *N*ovember Term, A. D. 1893.

WEDNESDAY, *Nov. 29th*, 1893—2 p. m.

Court convened pursuant to adjournment.

Present: Honorable Hiram Knowles, United States district judge for the district of Montana.

UNITED STATES }
vs. } No. 168.
HARRY F. BATCHELOR. }

Defendant, with his counsel, Messrs. Cullen and Toole, in court; and defendant, being arraigned, answered that his true name is Harry F. Batchelor. Defendant thereupon waived the reading of the indictment, and thereupon defendant — granted until Monday, December 4th, 1893, to enter his plea, and bond ordered fixed in the sum of $5,000.00.

And thereafter, to wit, on the 4th day of December, A. D. 1893, the following further proceedings were had and entered of record herein in the words and figures as follows, to wit:

(Title of Court and Cause.)

November Term, A. D. 1893.

MONDAY, *Dec. 4th*, 1893.

Defendant, with his counsel, in court, and thereupon defendant pleaded that he is not guilty, and thereupon said plea ordered entered; and thereupon the name of J. W. Strevelle ordered entered

as of counsel for said defendant; and thereupon affidavit and motion for a continuance of this cause being presented, after due consideration, motion allowed and cause ordered continued for the term; and thereupon said cause ordered set for trial Monday, April 9, 1894, at 10 a. m.

And thereafter, to wit, on the 9th day of April, 1894, the following further proceedings were had and entered of record herein in the words and figures as follows, to wit:

(Title of Court and Cause.)

April Term, A. D. 1894.

MONDAY, *April 9th*, 1894.

Defendant, with his counsel, Cullen and Toole and J. W. Strevelle, in court, U. S. District Attorney P. H. Leslie and William
96 Wallace, Jr., appearing on behalf of the Government, and thereupon, defendant being ready for trial, the following-named persons were duly empaneled, sworn, and accepted as a jury to try this cause, viz: * * * (before the jury were sworn to try the cause counsel for defendant offered to challenge peremptorily to the number of ten, having exercised three challenges). The court thereupon refused said offer and declined to grant request; to which ruling of the court defendant then and there excepted, and, after reading of portion of the indictment to the jury, further hearing of this cause continued until Tuesday, April 10th, 1894, at 10 a. m.

And thereafter, to wit, on the 10th day of April, A. D. 1894, the following further proceedings were had and entered of record herein in the words and figures as follows, to wit:

(Title of Court and Cause.)

Defendant, with his counsel, present in court, counsel for Government present; and thereupon defendant presented and filed a motion to compel the prosecution in this case to elect upon which counts in the indictment filed herein it will proceed to trial, and after argument of respective counsel motion submitted to the court for consideration and decision, and thereupon further trial of cause continued until Wednesday, April 11th, 1894, at 10 a. m.

And thereafter, to wit, on the 11th day of April, 1894, the following further proceedings were had and entered of record herein in the words and figures as follows, to wit:

(Title of Court and Cause.)

Defendant, with his counsel, present in court, counsel for Government present; and thereupon motion of defendant to compel election herein overruled except as to the objection to the eighth count of said indictment, which is ordered sustained; exception of de-

fendant noted, and after statement of counsel and examination of witnesses further trial of cause continued until April 12th, 1894.

And said cause being proceeded with on the 12th, 13, 14, 16, 17, 18, 19, 20, 21, 23 days of April, 1894, said cause was thereupon, on said 24th day of April, A. D. 1894, given to the jury after argument of counsel and instructions of the court.

97 And thereafter, on the 24th day of April, 1894, the following further proceedings were had and entered of record in the words and figures as follows, to wit:

(Title of Court and Cause.)

Defendant and respective counsel present in court; and thereupon the jury, having agreed upon a verdict, were brought into court, and being called by the clerk all answered to their names, and thereupon said jury rendered their verdict as follows:

"We, the jury in the above-entitled cause, find the defendant guilty under counts numbered as follows: Count numbered two (2).

S. C. GILPATRICK, *Foreman.*"

And said jury also presented the following:

"We, the jurors in the above-entitled cause, respectfully recommend the above defendant to the mercy of the court.

S. C. GILPATRICK, *Foreman.*"

And thereupon, at the request of defendant, jury polled, and each juror answered that the verdict as read was theirs, and thereupon verdict as rendered ordered entered; and upon interrogation by the court the jury answered that they found the defendant not guilty as to all other counts; and thereupon defendant ordered into custody of U. S. marshal.

And thereafter, to wit, on the 27th day of April, 1894, the defendant filed his motion in arrest of judgment; which said motion is in the words and figures as follows, to wit:

(Title of Court and Cause.)

Now comes the defendant, by his attorneys, J. W. Strevell and Cullen and Toole, and moves the court to arrest the judgment upon the verdict filed in the above-entitled cause on the 24th day of April, A. D. 1894, on the ground that the second count of the indictment upon which the jury returned a verdict of guilty does not state a public offense against the laws of the United States.

J. W. STREVELL,
CULLEN AND TOOLE,
Attorneys for Defendant.

Filed April 27th, 1894.

GEO. W. SPROULE, *Clerk.*

98 And said defendant, having reduced to writing and presented a minute of exceptions herein before the jury retired for consideration, afterwards, on, to wit, May 4th, 1894, filed his bill of exceptions herein; and thereupon the settlement of said bill of exceptions was ordered continued until motion in arrest of judgment — passed upon.

And thereafter, to wit, on the 18th day of June, 1894, the following further proceedings were had and entered of record herein as follows, to wit:

(Title of Court and Cause.)

April Term, A. D. 1894.

MONDAY, *June 18th*, 1894.

Court convened pursuant to adjournment.

Present: Honorable Hiram Knowles, United States district judge for the district of Montana.

Defendant, with his counsel, Messrs. Cullen and Toole, present in court, P. H. Leslie, U. S. attorney, and Wm. Wallace, Jr., appearing on behalf of the United States; and thereupon, after due consideration, it is ordered that the motion of defendant in arrest of judgment be, and the same hereby is, overruled; to which ruling counsel for defendant then and there excepted, and exception noted.

And thereupon, said defendant, with his counsel, being present in court, the judgment and sentence of the court was rendered and entered as follows:

UNITED STATES
vs.
HARRY F. BATCHELOR.

The United States attorney, with the defendant and his counsel, present in court. The defendant was duly informed by the court of the nature of the charge against him, as follows: That during the years 1891 and 1892 and 1893, while acting as president of the Stockgrowers' National Bank of Miles City, a national banking association, he, the said defendant, did wilfully misapply and convert to his own use moneys, funds, and credits of said national bank, with the intent to injure and defraud the said national bank, committed in the district of Montana; of his indictment, arraignment, and plea of not guilty of the offense charged in the indictment, and of his trial and the verdict of the jury on the twenty-fourth day of April, 1894, "We, the jury in the above-entitled cause, find the defendant guilty under count numbered as follows, count
99 numbered two (2);" and the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, and, no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment as follows: That whereas the said Harry F. Batchelor having been duly convicted in this court of the crime of wilfully misapplying and converting to his own use moneys, funds, and credits of the Stockgrowers' National Bank of Miles City, a national banking as-

sociation, with the intent to injure and defraud the said bank while acting as president thereof—

It is therefore ordered, adjudged, and decreed that the said Harry F. Batchelor be confined in the penitentiary at Deer Lodge, in the State and district of Montana, for the term of five years (5).

Judgment entered June 18th, 1894.

GEO. W. SPROULE, *Clerk.*

And thereafter, to wit, on the 20th day of June, 1894, the bill of exceptions of said defendant as presented and filed was allowed, settled, and signed; which said bill of exceptions is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
versus
HARRY F. BATCHELOR, Defendant.

Be it remembered that heretofore, to wit, on the 29th day of November, A. D. 1893, the grand jurors of the United States, duly empanneled, sworn, and charged to inquire within and for the district of Montana, in the ninth judicial circuit, and true presentments make of all crimes against the laws of the United States within the said district, upon their oaths and affirmations did find and present and did cause to be filed in open court in their presence, by their foreman, an indictment whereof the second count is in the words and figures following, to wit:

100 *Second Count.*

And the grand jurors aforesaid upon their oaths and affirmations aforesaid do further find and present—

That the said Harry F. Batchelor on the first day of January, 1891, and at divers times and dates between January 1st, 1891, and July 8th, 1893, was then and there the president and a director and agent of a certain national banking association, to wit, the Stock Growers' National Bank of Miles City, theretofore duly organized and established and then existing and doing business in the city of Miles City, in the circuit and district aforesaid, under the laws of the United States of America, did then and there, at the time aforesaid, within the said district, as such president, director, and agent, by virtue of such employment and while so employed, wilfully misapply forty thousand four hundred and twenty-two dollars and seventy-nine cents of the moneys, funds, and credits then and there belonging to and the property of said association, in the manner following, to wit: That the said Harry F. Batchelor, without the knowledge or consent of the said association or the board of directors thereof, he then and there and at all times well knowing both himself and the said J. W. Batchelor, hereinafter named, to be insolv-

ent and worthless, did then and there procure of the said J. W. Batchelor divers promissory notes payable to said association, some of which were endorsed by him, the said Harry F. Batchelor, but all without other or further security, with which said notes, by and through the device and pretence of discounting the same and making loans thereon, and with the proceeds of said loans so made thereon and thereby obtained by him, the said Harry F. Batchelor, he then and there knowing the said promissory notes to be inadequate security for the moneys so obtained, he did from time to time during the period aforesaid take up and satisfy the individual indebtedness of him, the said Harry F. Batchelor, to the said association, and thereafter in turn, by substituting the notes of him, the said Harry F. Batchelor, to said association, sometimes endorsed by J. W. Batchelor or by one William Harmon or by one George Newman or by one C. L. Merrill, he, the said Harry F. Batchelor, then and there well knowing the said notes to be inadequate security for the sums they represented, and the said notes never having with them any other security, he did then and there take up and cancel and pretend to pay to the said association
101 the indebtedness so created to said association by J. W. Batchelor as aforesaid, and did from time to time, by the fraudulent device and means aforesaid, as well as by passing differences between the face of said various notes and the indebtedness aforesaid which they were from time to time to satisfy to the credit of him, the said Harry F. Batchelor, upon the accounts of said association, gradually increase the amount of the actual indebtedness of him, the said Harry F. Batchelor, to the said association, all of which said sums were misapplied wilfully and in the manner aforesaid out of the moneys, funds, and credits of said association and converted then and there to the use, benefit, and advantage of said Harry F. Batchelor, with the intention then and there had and having in him, the said Harry F. Batchelor, to injure and defraud the said association, its depositors, and other persons, corporations, and firms then doing or who might thereafter do business with the said association, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And thereafter and on the 9th day of April, A. D. 1894, the said cause coming on for trial to a jury, the defendant having theretofore been arraigned on said indictment and having pleaded not guilty, the said trial thereof proceeded from day to day, and, after evidence on the part of the prosecution and the defense and argument of counsel and charge of the court to the jury, the jury retired to consider of their verdict, and on the said 24th day of April, A. D. 1894, they returned into court and, each having answered his name, they filed the following verdict:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA
vs.
HARRY F. BATCHELOR.

"We, the jury in the above-entitled cause, find the defendant guilty in counts numbered as follows: Count numbered (2).

S. C. GILPATRICK, *Foreman.*"

And the jury being interrogated, each answered that this was his verdict, and, being further interrogated by the court as to the other counts in said indictment, the jury said that as to all of said counts except said count numbered two they found the defendant "not guilty."

102 And thereafter and on the 27th day of April, 1894, the defendant, by his counsel, filed the following motion in arrest of judgment, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HARRY F. BATCHELOR, Defendant.

Now comes the defendant, by his attorneys, J. W. Strevell and Cullen and Toole, and moves the court to set aside the judgment upon the verdict filed in the above-entitled cause on the 24th day of April, A. D. 1894, on the ground that the second count of the indictment upon which the jury returned a verdict does not state a public offense against the laws of the United States.

J. W. STREVELL,
CULLEN AND TOOLE,
Attorneys for Defendant.

And thereafter and after argument by counsel and consideration by the court, the court, on the 18th day of June, A. D. 1894, overruled and denied the said motion and refused to arrest the judgment in said cause; to which said ruling of the court the defendant then and there, by his counsel, duly excepted and prays that this his bill of exceptions may be signed, sealed, and made a part of the record herein; which is done accordingly this 20th day of June, A. D. 1894.

HIRAM KNOWLES,
U. S. Dist. Judge.

Endorsed: Title of court and cause. Bill of exceptions. Filed June 20th, 1894. Geo. W. Sproule, clerk.

And thereafter, on said 20th day of June, 1894, in open court, the said defendant, by his counsel, appeared and presented and filed an assignment of errors herein in the words and figures as follows, to wit:

103 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA
vs.
HARRY F. BATCHELOR.

Comes now the defendant in the above-entitled action, in connection with his petition for a writ of error, and makes the following assignment of error, which he avers occurred upon the trial of the cause and in the rendition of the judgment herein, to wit:

The court erred in denying and overruling defendant's motion in arrest of judgment, for that the count of the indictment upon which the jury found the defendant guilty does not state facts sufficient to constitute an offense against the laws of the United States.

J. W. STREVELLE,
CULLEN AND TOOLE,
Attorneys for Defendant.

Endorsed: Title of court and cause. Assignment of errors. Filed June 20, 1894. Geo. W. Sproule, clerk.

And thereupon, on said 20th day of June, 1894, in open court, on motion of the counsel for defendant, the writ of error was allowed and citation ordered issued, said writ of error and citation being annexed hereto.

104 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the ninth judicial circuit, district of Montana, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The United States of America, plaintiff, and Harry F. Batchelor, defendant, a manifest error hath happened, to the great damage of the said Harry F. Batchelor, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the second Monday of August next, in the said Supreme Court to be

there and then held, that, the record and proceedings aforesaid be-inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of June, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and 18th.

Seal United States Circuit Court, District of Montana, 1890.

Attest: GEO. W. SPROULE, *Clerk.*

The above writ of error is hereby allowed.

HIRAM KNOWLES,
U. S. District Judge.

105 [Endorsed:] United States Supreme Court. Harry F. Batchelor, pl'ff in error, *vs.* United States of America, def't in error. Writ of error. Copy deposited for the defendant in error in the clerk's office, U. S. circuit court, 9th circuit, dist. of Montana, this 20th day of June, 1894.

The Answer of the Judges of the Circuit Court of the United States for the District of Montana to the Foregoing Writ.

The record and proceedings whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court, District of Montana, 1890.]

GEO. W. SPROULE, *Clerk.*

106 UNITED STATES OF AMERICA, *ss*:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the 13th day of August, A. D. 1894, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of the ninth judicial circuit within and for the district of Montana, in a certain action wherein Harry F. Batchelor is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hiram Knowles, United States district judge for the district of Montana, this 20th day of June, A. D. 1894, and of the Independence of the United States the one hundred and 18th.

HIRAM KNOWLES,
U. S. Dist. Judge.

107 Rec'd a copy of the within this 20th day of June, A. D. 1894.

PRESTON H. LESLIE,
U. S. Attorney, Dist. of Montana.

[Endorsed:] In the Supreme Court of the United States. United States of America *vs.* Harry F. Batchelor. Citation. Filed June 20th, 1894. Geo. W. Sproule, clerk. U. S. circuit court, dist. of Montana.

108 UNITED STATES OF AMERICA, } ss:
District of Montana, }

Circuit Court of the United States, Ninth Circuit, District of Montana.

I, George W. Sproule, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing volume, consisting of 108 pages, numbered consecutively from 1 to 108, inclusive, is a true and complete transcript of the records, process, pleadings, orders, judgment, and other proceedings in said cause and of the whole thereof, as appear from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, with the proof of service thereof, as also the writ of error, with return thereon.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Helena, in the district of Montana, this 25th day of July, A. D. 1894.

[Seal United States Circuit Court, District of Montana, 1890.]

GEO. W. SPROULE, *Clerk.*

109 In the Supreme Court of the United States, October Term, 1894.

HARRY F. BATCHELOR, Plaintiff in Error, }
vs. } No. 775.
THE UNITED STATES. }

Stipulation.

Inasmuch as the plaintiff in error was found not guilty in the circuit court upon all the counts of the indictment except the second, which count is incorporated in the bill of exceptions, and it is therefore unnecessary to print said indictment, it is now stipulated,

at the request of the counsel for the plaintiff in error, for the purpose of avoiding unnecessary printing, that from the printed record the indictment may be omitted.

W. E. CULLIN &
J. K. TOOLE,
Counsel for Plaintiff in Error.
LAWRENCE MAXWELL, JR.,
Solicitor General.

110 [Endorsed:] Case No., 15,659. Supreme Court U. S., October term, 1894. Term No., 775. Harry F. Batchelor, pl'ff in error, *vs.* The United States. Stipulation to omit parts of record in printing. Filed Sept. 18, 1894.

Endorsed on cover: Case No., 15,659. Montana C. C. U. S. Term No., 775. Harry F. Batchelor, plaintiff in error, *vs.* The United States. Filed August 6th, 1894.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 775.

HARRY F. BATCHELOR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN T. MORGAN,
JOS. K. TOOLE,
W. E. CULLEN,
Attorneys for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 775.

HARRY F. BATCHELOR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR PLAINTIFF IN ERROR.

The plaintiff in error was indicted at the November term of the circuit court, ninth circuit, district of Montana, under the provisions of section 5209 of the Revised Statutes of the United States, which denounces a penalty against bank officers who embezzle, abstract, or wilfully misapply the moneys, funds, or credits of the bank, or who make false entries in books, reports, or statements of the association. There were fifty-eight counts in the indictment charging offenses under this section. The case was tried at the April term, A. D. 1894, of the circuit court of the United States

for the ninth circuit, district of Montana, and the plaintiff in error was acquitted by the jury on all of the counts in the indictment save the second, upon which count he was found guilty. Subsequently a motion in arrest of judgment was made, based upon the proposition that the second count of the indictment, upon which the plaintiff in error was convicted, did not state an offense against the laws of the United States. This motion, coming on to be heard, was by the court overruled, and the judgment of the court was rendered sentencing the plaintiff in error to a term of imprisonment. This writ of error is sued out to reverse the judgment so made and entered in said cause.

The second count of the indictment, under which a conviction was had as aforesaid, is as follows, to wit:

"And the grand jurors aforesaid upon their oaths and affirmations aforesaid do further find and present—

"That the said Harry F. Batchelor, on the first day of January, 1891, and at divers times and dates between January 1st, 1891, and July 8th, 1893, was then and there the president and a director and agent of a certain national banking association, to wit, the Stock Growers' National Bank of Miles City, theretofore duly organized and established and then existing and doing business in the city of Miles City, in the circuit and district aforesaid, under the laws of the United States of America, did then and there, at the time aforesaid, within the said district, as such president, director, and agent, by virtue of such employment and while so employed, wilfully misapply forty thousand four hundred and twenty-two dollars and seventy-nine cents of the moneys, funds, and credits then and there belonging to and the property of said association in the manner following, to wit: That the said Harry F. Batchelor, without the knowledge or consent of the said association or the board of directors thereof, he then and there and at all the times well knowing both himself and the said J. W. Batchelor hereinafter named to be insolvent and worthless, did then and there procure of the said J. W. Batchelor divers promissory notes payable to said association, some of which were endorsed by him, the said Harry F. Batchelor,

but all without further or other security, with which said notes, by and through the device and pretense of discounting the same and making loans thereon and with the proceeds of said loans so made thereon and thereby obtained by him, the said Harry F. Batchelor, he then and there knowing the said promissory notes to be inadequate security for the moneys so obtained, he did from time to time during the period aforesaid take up and satisfy the individual indebtedness of him, the said Harry F. Batchelor, to the said association, and thereafter in turn by substituting the notes of him, the said Harry F. Batchelor, to said association, sometimes endorsed by J. W. Batchelor or by one William Harmon or by one George Newman or by one C. L. Merrill, he, the said Harry F. Batchelor, then and there well knowing the said notes to be inadequate security for the sums they represented, and the said notes never having with them any other security, he did then and there take up and cancel and pretend to pay to the said association the indebtedness so created to said association by J. W. Batchelor as aforesaid and did from time to time, by the fraudulent device and means aforesaid, as well as by passing differences between the face of said various notes and the indebtedness aforesaid which they were from time to time used to satisfy to the credit of him, the said Harry F. Batchelor, upon the accounts of said association, gradually increase the amount of the actual indebtedness of him, the said Harry F. Batchelor, to the said association, all of which said sums were misapplied wilfully and in the manner aforesaid out of the moneys, funds, and credits of said association and converted then and there to the use, benefit, and advantage of said Harry F. Batchelor, with the intention then and there had and having in him, the said Harry F. Batchelor, to injure and defraud the said association, its depositors, and other persons, corporations, and firms then doing or who might thereafter do business with the said association, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

It is well settled by the decisions of this Court that an indictment embodying only the language of section 5209 would not be good. The language there used does not fully, di-

rectly, and clearly set forth all of the elements necessary to constitute the offense intended to be punished. Says this Court in *United States vs. Briton*, 107 U. S., 655–671: "The words 'wilfully misapplied,' are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have not a settled technical meaning like the word 'embezzle' as used in the statutes, or the words 'steal, take, and carry away' as used at common law. *They do not, therefore, of themselves fully and clearly set forth every element of the offense charged.* It would not be sufficient to simply aver that the defendant 'wilfully misapplied' the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made and that it was an unlawful one."

The doctrine here announced seems to be well established in this Court.

U. S. vs. Hess, 124 U. S., 483.
U. S. vs. Cruikshank, 92 U. S., 542.
U. S. vs. Simmons, 96 U. S., 360.
U. S. vs. Carrill, 105 U. S., 611.

That it was necessary to set out the facts which constitute the offense seems to have been recognized by the pleader in this case. He has not attempted to charge the offense simply in the language of the statute, but has gone further and sought to allege the facts which seem to him to constitute a misapplication of the funds of the bank. The one question, therefore, in this case is whether the count sets out these facts with sufficient certainty. The certainty which is required in criminal pleading ought not to be a matter of dispute among lawyers. It is well settled that in describing an offense the facts, circumstances, and intent, which are the ingredients of the crime, must be stated with certainty and precision, so that the defendant may be able to perceive what the particular charge is he is called upon to meet, the

Court may know what sentence should be passed, and that on any future trial for the same offense the defendant may be able to plead a former conviction or acquittal in bar to further prosecution. The indictment must charge the crime with certainty and precision, and every fact necessary to be proved must be alleged.

State vs. Buster, 90 Mo., 514.

Mr. Bishop, in his excellent work on Criminal Procedure, in treating of the certainties required in criminal pleading quotes with approval from Lord Coke as follows:

"There be three kinds of certainties—First, to a common intent, and that is sufficient in a bar which is to defend the party and to excuse him; secondly, a certain intent in general, as in counts, replications, and other pleadings that is to convince the defendant, and so in indictments, etc.; thirdly, a certain intent in every particular."

He then points out that it is the middle certainty, or the certainty which lies between the two extremes, which mainly concerns us in its application to criminal procedure, and in defining what this certainty is he makes use of the following language:

"Let it therefore be defined thus: It requires that *in plain and direct terms every fact which is an element in the wrong* whereon a punishment to be inflicted is based be stated with the particular certainty of language which comes from the employment of the precise terms of the law in those cases in which they are legally more accurate than the popular forms of speech. Moreover, there must be such an averment of facts as shows *prima facie* guilt in the defendant; and if, supposing all the facts set out to be true, there is, because of the possible non-existence of some fact not mentioned, room to escape from the *prima facie* conclusion of guilt, the indictment is insufficient."

1 Bish. Crim. Proc., § 325.

The certainty required in an indictment seems to be well established by the decisions of this Court. In *United States vs. Cruikshank, supra*, this court says:

"It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species; it must descend to particulars" (1 Archibald Criminal Pl., 291). The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction should one be had; for this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set up in the indictment with reasonable particularity of time, place, and circumstances."

In *U. S. vs. Simons, supra*, the indictment was for the violation of the provisions of the revised statutes relating to the distilling of spirits. The second count, pursuing the words of the statute, charged that the defendant "did knowingly and unlawfully cause and procure to be used a still, boiler, and other vessel for the purpose of distilling within the intent and meaning of the internal revenue laws of the United States in a certain building and on certain premises where vinegar was manufactured and produced." The court held that this was not a sufficient description of the offense, and in rendering this decision says:

"Where the offense is purely statutory, having no relation to the common law, it is as a general rule sufficient in the indictment to charge the defendant with acts coming fully within the statutory description in the substantial words of the statute without any further expansion of the matter" (I Bishop's Crim. Prac., § 611, and authorities there cited). But, it adds, "To this general rule there is the qualification,

fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute."

So, too, in *U. S. vs. Hess*, 124 U. S., 483, Mr. Justice Field, in rendering the decision of the Court, says:

"The statute upon which the indictment is founded only describes the general nature of the offense prohibited, and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury. The general, and with few exceptions, of which the present case is not one, the universal rule on this subject is that all the material facts and circumstances embraced in the definition of the offense must be stated or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital."

Bearing in mind these rules for the determination of the sufficiency of an indictment, let us analyze the count here in controversy and ascertain if the offense sought to be charged is therein described with sufficient certainty to enable the defendant to intelligently prepare for his trial or to enable the Court to say that the facts, if true, constitute a misapplication of the funds of the bank, or if the defendant should be again indicted for some one or more of the offenses presumably charged in this count of the indictment he could plead his conviction in this case as a bar to further prosecution. It is not easy to understand exactly what it was that was intended to be charged in this count of the indictment. It is vague, indefinite, uncertain, and contra-

dictory in its allegations. It is charged that between January 1, 1891, and July 8, 1893, the defendant, while acting as president, director, and agent of the Stock Growers' National Bank of Miles City, Montana, "did then and there at the time aforesaid, within the said district, as such president, director, and agent, by virtue of such employment and while so employed, wilfully misapply $40,422.79 of the moneys, funds, and credits then and there belonging to and the property of said association." It will be observed that in this portion of the indictment there is no allegation as to what moneys, what funds, or what credits, or how much of either was thus misapplied. Money is defined to be coin; some metal, usually gold, silver, or copper, stamped by public authority and used as a medium of commerce. Bank notes are bills of credit used by the authority of some government and exchanged for coin.

The word "funds," as used in this indictment, is perhaps only synonymous with the word "money." Webster defines it as meaning "a stock or capital, a sum of money appropriated as the foundation of some commercial or other operation."

The word credits, as here used, we understand as being descriptive of sums of money due to the bank from its customers. Bouvier, as one definition of the word, says it means that which is due to a merchant, as distinguished from "debit," which is due by him. The allegation of the indictment is that there was a misapplication of the moneys, funds, and credits of the bank, but nothing is said as to the kind of money, the particular fund, or the particular credit thus misapplied, or the amount or value of either. Can there be any dispute about the proposition that this indictment ought to show that the money thus misapplied was the lawful money of some particular empire, kingdom, or country? The fact that a given number of dollars and cents are said to have been misapplied does not justify the conclusion or raise the presumption that this was lawful money of the

United States. Other countries than the United States have dollars and cents in their currency, and for aught that here appears it may have been money of some other kingdom or country than the United States, and of no specific value at the time and place where it was alleged to have been misapplied. The word "embezzle," says Mr. Justice Wood, in *U. S. vs. Britton, supra*, has a technical meaning, and from this fact we infer that in an indictment for embezzlement less particularity in the description of the funds would be required than in one where there was no such well-understood technical meaning to the word used as descriptive of the offense. In other words, a greater particularity of description is required in an indictment for the misapplication of money than would be for its embezzlement, and we think it is pretty well established that if this were an indictment for embezzlement it would be insufficient because it does not state that the money was lawful money of the United States or that it was of any particular value.

Says the court in *People vs. Cohen*, 8 Cal., 42: "There is another objection to the indictment which is fatal. It does not state what was the property converted. The language is 'four hundred thousand dollars, moneys, goods, and chattels.' How can the defendant know what he is charged with or how prepare for his defense? How much money, what goods, and what chattels? These facts must to a certain extent be within the knowledge of the prosecution. Besides this the allegation that they were of the value of or the amount of four hundred thousand dollars is insufficient to give the court jurisdiction. The court cannot know that by four hundred thousand dollars was meant so much lawful money of the United States. For aught we may know, it is the currency of some other State or nation, and not sufficient in amount to charge the defendant under our statute with grand or petit larceny."

This new offense, "the misapplication" of the moneys,

funds, or credits of a national bank, is grouped in the same section with embezzlement, is visited by the same penalty, and both are thereby declared to be misdemeanors. It follows, therefore, that they must be of the same grade, and that like incidents attend each of these offenses. Embezzlement embraces all of the elements of larceny except the actual taking of the property embezzled, that being already rightfully in the possession of the embezzler.

State vs. Baldwin, 70 Ia., 180.

It seems to be well settled that in indictments for embezzlement unless the pleader is relieved from this exactness by some special statute, as is the case in some of the States, though not in the State of Montana or in the United States, the goods and ownership must be set out with the same completeness as in larceny.

1 Wharton's Crim. Law, § 1044.

In *Merwin vs. People,* 26 Mich., 298, the information was for larceny, setting forth that the defendant had stolen "$135 of the property, goods, and chattels," of the value, etc. Says Chief Justice Christiancy, after stating the reasons why certainty in an information is required: "The ultimate design of all these objects is fairness to the prisoner, and consequently any indictment which has failed to set forth the offense with such certainty as to accomplish any of these purposes as far as the nature and circumstances of the case would permit has generally been held bad upon general demurrer or motion in arrest of judgment or on writ of error."

He then proceeds to point out that in some cases and to some extent an omission to state facts which are not essential constituents of the offense in the abstract, but which are required to be stated, if known, may be excused by an allegation on the face of the indictment showing why they could not be stated, and that while the law requires these facts to

be stated with as great particularity as is possible, yet where they were not within the knowledge of the prosecution it may be averred in the indictment that they were to the grand jurors unknown.

Speaking of the general nature of the charge in the information which he had before him, he says:

"It is easy to see that under this general charge the defendant might have been put upon his trial for a transaction wholly distinct from that intended to be sworn to by the person verifying the information, and unless we are to presume in advance that the defendant is guilty and must therefore know the transaction intended to be proved against him (which would be reversing the legal presumption) what information does it give the defendant of the nature of the evidence intended to be introduced, and what information for his future protection would the record of his acquittal or conviction afford him?"

These inquiries are peculiarly pertinent in the case at bar. It is manifest that the conviction of the defendant upon the general charge found in this indictment affords him no information whatever as to the nature of the evidence intended to be introduced against him and would afford him no protection in a subsequent trial for the same offense.

In *State vs. Hinckley*, 4 Minn., p. 345, the indictment charged the defendant with having stolen "divers bank bills, amounting in the whole to the sum of five hundred dollars and of the value of five hundred dollars." The court in this case, after citing the rules for testing the sufficiency of the indictment, says: "Tested by the above rules, is the allegation in the indictment with reference to the bank bill sufficiently certain? I think not. In this case the number of bills stolen is not stated, nor their denomination, nor the bank by which issued, nor that they were genuine or current; no description whatever is given. * * * None of the objects for which certainty in a pleading is required are answered by such an informal allegation. Under

such a statement it would be quite possible that the defendant might have been put upon his trial for a different offense than the one found in the bill. Nor is he put in possession of sufficient facts to enable him to prepare for his defense, nor is it easy to see how a conviction or acquittal on such a charge could be a protection to a subsequent indictment for the same offense."

In *State vs. Segermond*, 40 Kans., 147, the information—for robbery—described the property taken as "twenty-five dollars in money, the said money then and there being the property of the said John Bond," but not alleging its value or that it was of any value or giving any excuse for the want of a more particular description. It was held to be fatally defective and insufficient to sustain a judgment of conviction. "Twenty-five dollars in money," says the court, "may, it is true, mean gold or silver coin of the United States or Treasury notes or any other denomination known and used and which circulates as money, or it may mean only some paper such as State bank bills or Confederate money or bills purporting to be of the value of $25. There should be no uncertainty, and no excuse can be given for leaving to conjecture what can be so easily stated."

A description as general as in the indictment in the case at bar has been held insufficient in the following cases:

Stewart vs. Commonwealth, 4 Seg. & R., 194.
State vs. Jewell, 3 Gill & J., 310.
State vs. Murphy, 6 Ala., 845.
People vs. Jackson, 8 Penn. St., 637.
State vs. Stimson, 4 Zeb., 9.
Commonwealth vs. Maxwell, 2 Pick., 243.
State vs. Smith, 33 Ind., 159.
State vs. Longbottom, 11 Humphreys, 39.
Martinzie vs. State, 41 Texas, 164.
Ridgeway vs. State, ibid., 231.
People vs. Bogart, 36 Cal., 245.

In Virginia, under a special statute, an indictment for the larceny of several notes of the national currency of the United States, stating the value is sufficient.

Dowell vs. Commonwealth, 25 Grat., 965.

An allegation of the value of the money stolen at least in the aggregate is always essential.

Commonwealth vs. Smith, 1 Mass., 245.
State vs. Rout, 3 Hawks, 618.
People vs. Jackson, 8 Barb., 637.
People vs. Green, 15 Cal., 512.
People vs. Vice, 21 Cal., 344.
Saulisbury vs. State, 6 Conn., 101.
State vs. Mahonna, 48 N. H., 377.
State vs. Thomason, 71 N. C., 146.
Boyle vs. State, 37 Texas, 359.

In *Lewitch vs. The Commonwealth*, 20 N. J., 716, the indictment described the money as "$90 in United States currency." The court held the description insufficient and said: "United States currency may be gold or silver or Treasury notes or bank notes. Proof that any of these were obtained by the false pretenses alleged would be proof consistent with the indictment. It therefore is too vague. It ought to show what kind of United States currency was obtained."

In a case in Mississippi the indictment charged the prisoner with stealing "$150 in United States currency." It was held void for uncertainty after verdict, and the judgment was arrested.

Merrill vs. State of Mississippi, 45 Miss., 651.
Crocker vs. State, 47 Ala., 52.

In Tennessee, the money stolen being described as "one five and one two dollar greenback bills, United States cur-

rency, national bank bills, and money," was held bad for being indefinite and uncertain.

Lewis vs. State, 3 Heisk., 333.

In some of the States, as in Ohio and Louisiana, there are statutes which make it sufficient to describe the subject of the larceny as so many dollars or so many dollars in money without further particularization.

McDivitt vs. State, 20 Ohio St., 231.

State vs. Walker, 22 La. Ann., 425.

In *People vs. Ball*, 14 Cal., 101, the defendant was indicted for larceny and the property was described as "three thousand dollars lawful money of the United States." The court said: "This description is not sufficient. In an indictment for larceny the money should be described as so many dollars of the current gold or silver coin of the country of a particular denomination, according to the facts. The species of coin must be specified."

Archibald's Criminal Prac. and Pl., 61.

Wharton's Crim. Law, 132.

The supreme court of Tennessee decided that an indictment charging the defendant with stealing ten thousand dollars good and lawful money of the State of Tennessee was bad for want of description.

State vs. Longbottom, 11 Humphrey, 39.

See also—

Ridgeway vs. State, 41 Tex., 231.

Lavarre vs. State, 1st Tex. Appeals, 685.

In some jurisdictions, under special statutes, where the custodian of public funds is charged with embezzlement a particular description of the funds so embezzled has been held to be unnecessary; as, for example, in the cases of—

State vs. Smith, 13 Kans., 274.

State vs. Carrick, 16 Nev., 121.

But in neither of these cases nor in any other where the question has been raised has an indictment been held sufficient that did not aver the character of the money embezzled and its value. In the Nevada case, as shown by the opinion of Judge Halley, the money was described as being sundry gold and silver coins, lawful money of the United States of America and of the value of $21,940.91, a more particular description of which gold and silver coins the grand jury cannot give, as they have no means of knowledge." So, too, in the Kansas case, the value of the money and the securities embezzled was alleged in the information, and the objection to it was that it did not describe the kind of money embezzled—*i. e.*, the particular bills or coins. Under the statute of Kansas defining this offense this was held to be unnecessary. It seems to us, therefore, that it is beyond doubt that the count upon which this defendant was found guilty is vitiated for the failure to state that the forty-odd thousand dollars so alleged to have been misapplied was in lawful money of the United States or of some other government, and that it was of some specific value. For aught that appears to the contrary, it may have been money issued by the late Confederate States of America and utterly valueless. But if the charging part of this indictment were good and stated enough to show that there had been a misapplication of the moneys, funds, or credits belonging to the bank, substantially in the words of the statute, this would not be sufficient. There must be averments to show how the misapplication was made and that it was an unlawful one.

U. S. vs. Britton, supra.

Coming now to the descriptive portion of the count, we find that it is even more vague than the charging part. After alleging a formal matter, it is charged that the defendant, "then and there and at all the times well knowing both himself and the said J. W. Batchelor hereinafter named

to be insolvent and worthless, did then and there procure of the said J. W. Batchelor divers promissory notes payable to said association, some of which were endorsed by him, the said Harry F. Batchelor." Could anything be more vague, indefinite, and uncertain than this allegation? What promissory notes were thus obtained? When were they given? For what sums? What were their purport? How many of them were there? When and how were they payable? What is there here to identify these notes with such certainty as to enable this defendant to prepare his defense? Or, suppose a new indictment were found against him for the misapplication of some one or more of these notes, what is there here that would enable him to plead his conviction in bar of a prosecution? There is not in this allegation, nor is there anywhere in this count or, for that matter, in the entire indictment, anything showing or tending to show that by virtue of these notes either the said J. W. Batchelor or the defendant ever received a dollar of the bank's money in consideration for the notes thus given; for aught that appears, these notes may have been mere accommodation paper. They may have been notes given under some contract or agreement by which they were not to become operative except upon the happening of some event which never happened. If there were not some funds belonging to the bank withdrawn from its vaults in consequence of the execution of these notes, then it seems clear that there was no infraction of the section of the statute under which this prosecution is brought.

It is further charged against the defendant that "with said notes, by and through the device and pretense of discounting the same and making loans thereon, and with the proceeds of said loans so made thereon and thereby obtained by him, the said Harry F. Batchelor, he then and there knowing the said promissory notes to be inadequate security for the moneys so obtained, he did from time to time during the periods aforesaid take up and satisfy the individual

indebtedness of him, the said Harry F. Batchelor, to the said association." This language is certainly not a model of perspicuity. It is not easy to understand what is intended. If any of these notes were discounted, which ones were so discounted and by whom was the discount made? Discounting a note, as the phrase is understood by bankers, is the taking in advance of interest which would be due at the maturity of the note. By whom were these discounts made and what has the discounting of this paper or any of it to do with any misapplication of the moneys, funds, or credits of the Stock Growers' bank? And loans were made thereon; whether upon all of the notes thus given or only some of them, does not appear. It would not be impossible, of course, to discount some of these notes and obtain loans on other notes; but there is nothing to show that the money obtained on these notes came from the Stock Growers' National bank. And "*with the proceeds of said loan.*" It will be noted that in the first case there were "*loans*" made on these notes. Now, it is *with the proceeds of said loan.* What loan; how much money was loaned, and by whom? Somebody has said that words were invented to conceal ideas. We do not think that words could have been used that would be more successful in concealing the facts which the pleader in this case was attempting to set out.

And the defendant is charged with the guilty knowledge of "knowing that the said promissory notes were inadequate security for the money so obtained." There is no allegation showing that any moneys whatever were obtained, and if, as a matter of fact, none were obtained, then it does not matter whether these notes were adequate or inadequate security; but "*with the proceeds of these loans so obtained the defendant took up and satisfied his individual indebtedness.*" Here, again, there is nothing specified that answers to the rules requiring certainty in pleading. What indebtedness was it that the defendant thus took up and satisfied? The only information which the indictment gives is that it was

his "individual indebtedness," but to whom or how created or the amount or as to any other feature of it it is entirely silent. The indebtedness thus satisfied may have been owing to the Stock Growers' National bank by the defendant, or it may have been to third parties, but for what or to whom owing seems to be immaterial, because it has been satisfied, and that, too, so far as the allegations of this indictment are concerned, without any misapplication of any of the moneys, funds, or credits of this bank.

But it is further charged that the defendant "thereafter and in turn, by substituting the notes of him, the said Harry F. Batchelor, to said association, sometimes endorsed by J. W. Batchelor, or by one William Harmon, or by one George Newman, or by one C. L. Merrill, but the said Harry F. Batchelor then and there well knowing the said notes to be inadequate security for the sums they represented, and the said notes never having with them any other security, the defendant then and there took up and cancelled and pretended to pay the said association the indebtedness so created to the said association by said J. W. Batchelor." The defendant substituted his own notes, sometimes endorsed by three parties and sometimes endorsed by J. W. Batchelor, for the notes given by J. W. Batchelor; but it is not alleged that any money was withdrawn from the vaults of the bank, nor that one series of notes were substituted for the other, nor that the bank was in any way injured by the transaction. He is charged also with well knowing that the notes were inadequate security for the sums they represented, and there is no allegation that they represented any sums whatever, and there is no allegation of any actual indebtedness having been created to this bank by any of these persons. If there was no indebtedness, the allegation that these notes did not have with them any other security does not seem to be material. The defendant has already paid his indebtedness by the *proceeds of said loan*, and there is no allegation here that the giving of these new notes created

any new indebtedness. How do these allegations or any of them show that there was a misapplication of the funds of this bank or any unlawful application of its funds? With the notes thus given, it is charged that he took up and pretended to pay to the said association the indebtedness so created to said association by J. W. Batchelor as aforesaid. There is nothing, as we have seen, in the preceding part of this count which shows that Mr. J. W. Batchelor ever owed this bank a nickel.

It is further said that he did, "by the fraudulent device and means aforesaid, as well as by passing differences between the face of said various notes and the indebtedness aforesaid which they were from time to time used to satisfy to the credit of him, the said Harry F. Batchelor, upon the accounts of said association, gradually increase the amount of the actual indebtedness of him, the said Harry F. Batchelor, to the said association." We respectfully submit that there is no allegation of anything in the preceding part of the count that charges any fraudulent devices or means of any kind. There is no allegation of fraud. It is well settled the merely alleging an act to be fraudulent does not sufficiently charge fraud. The facts themselves must be stated, and they characterize the transaction as fraudulent or otherwise. And he "passed differences between the face of said various notes upon the accounts of said association." There is nothing here to enable us to determine what is meant by "*passing differences*," and nothing is said as to what amounts, if any, were passed or to what account or in what particular books of account of said association the same were so passed. And "the defendant thereby gradually increased the indebtedness of him, the said Harry F. Batchelor, to the said association." How much of an increase there was is not stated. We have already seen that by the proceeds of the loan which he negotiated by some means he paid all his "*individual indebtedness*," and there is no allegation that subsequent to the payment of his "individual indebtedness" he cre-

ated an actual or any other kind of an indebtedness to this association. It is therefore reasonably clear that the passing of differences or the increasing of the amount of his actual indebtedness could not and did not in any way create a misapplication of the moneys, funds, and credits of the association. The count continues: "All of which said sums were misapplied wilfully and in the manner aforesaid out of the moneys, funds, and credits of said association."

The word "sums," as here used, seems to be only applicable to moneys or funds. In the ordinary use and acceptation of the word, it would not be understood as referring to the misapplication of the notes, which is mysteriously and vaguely hinted at throughout most of this count. These notes must have been "credits" within the meaning of the act, and if it had been the intention of the pleader to charge the defendant with the misapplication of one or more of these notes he certainly would have said so in distinct and unmistakable language. He would not refer to the misapplication of a note given by an "insolvent and worthless" maker and bearing the endorsement of another equally "insolvent and worthless" person as being the misapplication of a sum. We think we are justified in saying that if it was "sums" that were misapplied, then all that this count contains relative to the notes of J. W. Batchelor and the defendant is mere surplusage.

The jury having found the defendant "not guilty" upon all of the counts submitted to them, except upon the second, the sufficiency of the latter must be determined by the allegations contained in it, unaided by any extrinsic matter found in any other count.

If an indebtedness can be created by the mere execution of a promissory note, which has not passed into the hands of an innocent purchaser for value, where no consideration is shown, then it appears that Harry F. Batchelor was indebted to the Stock Growers' National bank in a large sum of money as evidenced by certain promissory notes then in

the bank endorsed by himself and his father, both of whom are alleged to have been insolvent. It must be borne in mind, so far as these notes and the obtaining of money on them (if any was obtained) is concerned, there is no intimation in this count that the transaction was not honorable, or that the insolvency of said H. F. Batchelor had then occurred. No crime is therein predicated upon taking or receiving the money represented by the notes of Harry F. Batchelor, first mentioned, if any was received, as endorsed by his father, J. W. Batchelor, but the first charge indicated by this count relates to substituting the notes of J. W. Batchelor for those of H. F. Batchelor. If this transaction in any manner changed the character of the bank's security to the detriment of the bank, it must be admitted that it was wanting in integrity from which the law might presume a criminal purpose, but the facts alleged in this count rebut any such purpose, for it appears that both of the Batchelors were insolvent. It was the substitution of nothing for nothing.

Proceeding further it is charged that the said Harry F. Batchelor in turn substituted the notes of him, the said Harry F. Batchelor, to said association, sometimes endorsed by J. W. Batchelor, or one William Harmon, or by one George Newman, or by one C. L. Merrill, knowing the same to be "inadequate security for the sums represented by said notes," and with said notes took up the notes of said J. W. Batchelor." What is the logical result? Both Batchelors were insolvent, and the only effect of changing the paper was to improve it. It could not have been made worse. By every rule of legal construction the averments in this count show that the paper was appreciated in value because of the endorsements of Harmon, Newman, and Merrill, who are not charged to have been insolvent; but it is charged in this count that Harry F. Batchelor knew that the notes so endorsed were inadequate security for the sums which they represented. If this were true and the endorsers were insolvent we have already

shown that it did not and could not injure or tend to injure the bank for the reason that the paper of one insolvent is not less valuable than the paper of another insolvent in law; and this brings us to another part of this count relating to the charge that in this transaction the said Harry F. Batchelor increased his indebtedness to said bank by "passing differences" between the face of said various notes to his individual credit. In the absence of an allegation that he was not entitled to the differences so passed to his credit no wrongful act can be presumed. What were the differences? The argument and authorities already cited show that the defendant was entitled to know the amount of these differences. They may have been due and owing to him on account of some other transaction with the association. At all events it does not appear that it was a credit to which he was not entitled. The difference may have been actually deposited before that or contemporaneously to the credit of the bank.

To hold that such a charge, consistent as it is with so many theories of honesty and integrity, imputes a crime would, it seems to us, reverse the whole system upon which the criminal jurisprudence rests; but, pursuing the proposition a little further, suppose that it was true that differences were passed to which he was not entitled, how does the case stand? Stripped of unnecessary verbiage, here is the situation:

The defendant, knowing that the last notes executed by him and endorsed sometimes by one Harmon, sometimes by one Newman, and sometimes by one Merrill and which were substituted for the notes of J. W. Batchelor "were inadequate security for the sums they *represented*," did increase his indebtedness to the bank by "passing differences" between the face of said various notes. The first inquiry, naturally enough, is, What sums did said notes represent? If they represented just the amount of the J. W. Batchelor notes, which were endorsed by the three endorsers above

named, they may have been inadequate security for such amount, but this would not have affected the transaction to the detriment of the bank, because the antecedent paper was likewise bad, and, until there is some new discovery in physics by which you can spoil a bad egg, we insist that no harm was done by this substitution; but suppose that these several notes represented, in addition to the principal and interest of the antecedent notes for which the last were substituted, the "difference" so passed to the credit of the defendant, what excuse can be offered for the inference sought to be deduced, that they were inadequate security for the difference so passed?

We respectfully submit that the objection to this count, to wit, that it does not state any offense known to the laws of the United States, is well taken. The descriptive part of this count is unintelligible jargon and charges no offense whatever. "Moreover," says Mr. Bishop, "there must be such an averment of fact as shows *prima facie* guilt in the defendant, and if, supposing all the facts set out to be true, there is, because of the possible non-existence of some fact not mentioned, room to escape from the *prima facie* conclusion of guilt, the indictment is insufficient." Confessing every fact which is set out in this count to be absolutely true, there is nothing charged that shows the defendant to be guilty of any legal or moral wrong.

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156-426

In the Supreme Court of the United States

OCTOBER TERM, 1894.

HARRY F. BATCHELOR, PLAINTIFF in error,
v.
THE UNITED STATES.
No. 775.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

The single question presented for consideration here is as to the sufficiency of the second count in the indictment, on which alone the plaintiff in error was convicted for violation of section 5209 of the Revised Statutes.

The motion in arrest of judgment, by which this question was raised in the court below, was made—

> On the ground that the second count of the indictment, upon which the jury returned a verdict of guilty, does not state a public offense against the laws of the United States.

The views on which it is relied to sustain this ground are presented in the brief for plaintiff in error.

Before proceeding to an analysis of the count and an examination of its constituent parts, we will look to that feature which pervades the entire count, and which it is claimed is inadequately set forth, and which is stated in the brief of plaintiff in error, page 8, as follows:

> It will be observed that in this portion of the indictment there is no allegation as to what moneys, what funds, or what credits, or how much of either, was thus misapplied.

Many cases are cited in the brief of larceny and embezzlement which are supposed to sustain the objection; although it is stated on page 14 that—

> In some jurisdictions, under special statutes, where the custodian of public funds is charged with embezzlement, a particular description of the funds so embezzled has been held to be unnecessary, as, for example, in the cases of *State* v. *Smith*, 13 Kans., 274; *State* v. *Carrick*, 16 Nevada, 121.

And some explanation or apology is offered for this apparent exception to the general law on page 15.

We think it will be found that this exception does not rest, as is supposed, altogether upon special statutes, but is made necessary by essential differences which exist between cases of private and public spoliation.

We are aware of no special statute of the United States which provides expressly for any departure from the usual forms of indictments for larceny or embezzlement from private persons.

In *United States* v. *Borneman* (36 Fed. Rep., 257) the defendant was indicted for embezzling $10,000 of the money of the United States in his custody as cashier, etc. It was insisted that the indictment was defective for not stating what kind of money, whether coin, gold, or silver, or bills, and of what denomination, and how much of each.

The court, in overruling that objection, said:

> It may be conceded that at common law it will be necessary to state these particulars in case of embezzlement by the clerk, servant, agent, or employee of private parties, but in the case of embezzlement of public funds by a public officer, where the funds are constantly changing, and the public has no direct possession or oversight, and where it would be ordinarily impracticable, if not impossible, to identify and pursue the particular coin or bills embezzled, it is held in numerous decisions that such particularity is unnecessary.

To be sure, this refers in terms to "public officers" and to "public moneys." It is cited here only for the purpose of calling attention to the fact that the distinction between public and private moneys is not the result of special statutes, and also to show that the reason suggested in this opinion applies with equal force to the case of a national bank.

The offense charged here is not embezzlement, or larceny, or any other offense known to the common law. It is the creation of a Federal statute, designed to secure official care and fidelity in the preservation of the assets of the bank. It is designated in the statute as "willful misapplication."

> And there must be averments to show how the application was made, and that it was an unlawful one. (*United States* v. *Britton*, 107 U. S., 669.)

In embezzlement or larceny there must necessarily be the appropriation of some specific, definite, ascertained article, which may be described in the count and clearly identified by the proof; but not so with "willful misapplication." That may be done by the officer of the bank making a "false entry" in its books; or by certifying a check when the maker thereof has not to his credit funds in the bank to meet it; or by false credits, the amounts of which may be disposed of by checks, which in turn may be cashed by the paying teller from the funds in his custody.

Indeed, from all that appears in the count here not one dollar in actual cash need have crossed the counter of the bank, for the averment is that the proceeds of the discounts of the promissory notes were applied to the payment of other notes of the defendant and others held by the bank. (See form of count in *Evans* v. *United States*, 153 U. S,. 585.)

In indictments against bank officers for the wrongful appropriation of funds intrusted to them, no specification in the indictment of the kind of money so appropriated is required, because it would not be practicable to make such specification. Whatever may be the character of the money of which the fund is constituted, whether gold, silver, or bank bills, when once deposited in the bank (unless it is a special deposit) it is merged in the general mass of the entire deposits of the bank, and is incapable of specific identification; consequently no such specification will be found in the precedents. (2 Bish. Crim. Proc., sec. 339; Archbold's Crim. Pleading and Ev., 10 London ed., 283.)

ANALYSIS OF THE COUNT.

To ascertain more clearly just what is charged in this count, let us look at its several parts separately, and see whether or not they show "how the application was made and that it was an unlawful one."

I.

> That the said Harry F. Batchelor on the first day of January, 1891, and at divers times and dates between January 1, 1891, and July 8, 1893, was then and there the president and a director and agent of a certain national banking association, to wit, the Stock Growers' National Bank of Miles City, theretofore duly organized and established and doing business in the city of Miles City, in the circuit and district aforesaid, under the laws of the United States of America—

Now, here is charged the name of the defendant, his official character, the bank of which he was president, director, and agent, the date of and period within which he was such president, etc., and the location of the bank within the jurisdiction of the court—

II.

> did then and there, at the time aforesaid, within the said district, as such president, director, and agent, by virtue of such employment and while so employed, willfully misapply $40,422.79 of the moneys, funds, and credits, then and there belonging to and the property of said association, in the manner following, to wit:

Here it is charged that the defendant did some act; that he did it as president, etc., and that he did it by the

means, opportunities, and facilities which that office afforded him and while he was so employed, which excludes the idea of larceny and expresses that the act was done while acting in virtue of his official capacity. The act done was the "willful misapplication" of the moneys, funds, and credits belonging to and the property of the bank; and the amount thus misapplied is stated.

III.

> That the said Harry F. Batchelor, without the knowledge or consent of the said association, or the board of directors thereof, he then and there and at all times well knowing, both himself and the said J. W. Batchelor, hereinafter named, to be insolvent and worthless, did then and there procure of the said J. W. Batchelor divers promissory notes, payable to said association, some of which were indorsed by him, the said Harry F. Batchelor, but all without other or further security, with which said notes, by and through the device and pretense of discounting the same and making loans thereon, and with the proceeds of said loans so made thereon, and thereby obtained by him, the said Harry F. Batchelor, he then and there knowing the said promissory notes to be inadequate security for the money so obtained, he did, from time to time during the period aforesaid, take up and satisfy the individual indebtedness of him, the said Harry F. Batchelor, to the said association.

Here is the first specification of the manner and means by which the defendant did make the willful misapplication.

He procured of J. W. Batchelor certain notes made payable to the bank, some of which were indorsed by the defendant, but all without other or further security. He

knew at the time that both J. W. Batchelor and himself were insolvent and worthless. He knew that these notes had no other or further security than these insolvent and worthless parties. Yet he, as president of the bank, by and through the device and pretense of discounting said notes and making loans thereon, did, from time to time during the period aforesaid, pay off his own notes held by the bank with the proceeds of the loans or pretended loans, made on the notes of J. W. Batchelor and himself, he then knowing said notes to be inadequate security for the money so obtained by him.

Now, there can be no doubt that if a president of a bank discounts a note made by parties he knows to be insolvent and worthless, a note which he knows to be inadequate security for the money loaned on it—and he does this for the use and benefit of himself or another, and with intent to injure and defraud the bank—that he is guilty of a misapplication of its funds.

In *United States* v. *Fish* (24 Fed. Rep., 590) it was said:

> It is a mistake to suppose that there can not be a criminal misapplication of the moneys of a national bank by means of a loan. The decisions of the Supreme Court in the *Britton cases* countenance no such idea. If the transactions in question were loans the question would still be whether they were such loans as amounted to a misapplication. * * * He had no right to make loans which he knew, or believed, would not be approved by the board of directors if the circumstances were known; much less had he the right to continue a series of transactions as loans, wholly peculiar, exceptional, and dangerous in character without communicating to

> the board of directors what knowledge he had respecting these transactions, and when he knew that such knowledge by the board of directors would have prevented a repetition of the loan. * * * A known abuse of discretionary power in making a series of loans, which it is known that the directors would not sanction, will constitute a criminal misapplication if proven to have been done in bad faith for private gain and not in the exercise of honest judgment.

And now as to the language in which the valueless character of the notes discounted by the defendant is charged:

In *United States* v. *Means* (42 Fed. Rep., 601) it is said:

> Referring also to a former clause of this act, we are inclined to think that if anything is established by this proof it is that the directors who entered into this syndicate to purchase the stock of the bank by stripping the bank itself of the money necessary to pay for it, under the circumstances shown here, of taking the money under the guise of loans to themselves, without any security, or upon inadequate security, were guilty of abstraction or willful misapplication of the funds of the bank.

In *Evans* v. *United States* (153 U. S., 592) this court said:

> While the mere discount of an unsecured note, even if the maker and the officer making the discount knew it was not secured, would not necessarily be a crime if the maker believed that he would be able to provide for it at maturity, yet if his original intent was to procure the note to be discounted in order to defraud the bank, as charged in this count, every element of criminality is present.

A further specification of the means by which this willful misapplication was made is charged in the following language:

IV.

> And thereafter, in turn, by substituting the notes of him, the said Harry F. Batchelor, to said association, sometimes indorsed by J. W. Batchelor, or by one William Harmon, or by one George Newman, or by one C. L. Merrill, he, the said Harry F. Batchelor, then and there well knowing the said notes to be inadequate security for the sums they represented, and the said notes never having with them any other security, he did then and there take up and cancel and pretend to pay to the said association the indebtedness so created to the said association by J. W. Batchelor as aforesaid.

Wherein it is charged that the defendant, as president of the bank, substituted his notes to the bank, indorsed by various persons, for the notes of J. W. Batchelor, payable to and held by the bank, he knowing at the time that his notes, so substituted by him, were inadequate security for the amounts represented by them, and did thereby, as such president, cancel and pretend to pay to the bank the indebtedness to it represented by the notes of J. W. Batchelor.

This was simply doing for J. W. Batchelor's notes what it had been heretofore charged in the count he had done for his own, to wit, pay them off with worthless paper, which he, as president of the bank, received in payment of the debt. What has heretofore been said and the authorities heretofore cited have equal application here.

And still another means of willful misapplication is specified in

V.

And did from time to time by the fraudulent device and means aforesaid, as well as by passing differences between the face of said various notes and the indebtedness aforesaid, which they were from time to time to satisfy, to the credit of him, the said Harry F. Batchelor, upon the accounts of said association, gradually increase the amount of the actual indebtedness of him, the said Harry F. Batchelor, to the said association.

Which charges that the defendant did increase the amount of his indebtedness to the bank by passing to his own credit upon the accounts of the bank the differences between the face value of the various worthless notes received by him as president of the bank and the amount of his indebtedness to the bank, to the satisfaction of which these worthless notes were applied by him.

The mere statement of such a transaction by a president of a bank evinces such an abuse of his official discretion and power for his own personal advantage as makes argument needless.

Now, as to all of the foregoing parts of this count, which are hereinbefore recited, there is applied this clear, explicit, and comprehensive charge:

VI.

All of which said sums were misapplied willfully and in the manner aforesaid and out of the moneys, funds, and credits of said association and converted then and there to the use, benefit, and advantage of the said Harry F. Batchelor, with the intention then and there had and having in him, the said Harry F.

> Batchelor, to injure and defraud the said association, its depositors and other persons, corporations, and firms then doing, or who might thereafter do business with the said association contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Here every element of criminality is charged as to the specific acts done by the defendant, as set forth in the count.

As a literary composition the count is certainly open to improvement. It is not in accord with accepted rules of rhetoric, or even grammar. But it does set forth in intelligible form facts sufficient in connection with the charges made as to them in the count to constitute the crime of willful misapplication. And this is the offense with which the defendant was charged and of which he has been convicted. He has not been charged or convicted of larceny or embezzlement, or of any other offense to which the views and authorities displayed in the brief of the plaintiff in error may be pertinent.

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